Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor

HIGH COURT (TAWAU) — SUIT NO T55 OF 1988
IAN HC CHIN J
30 NOVEMBER 1993

Civil Procedure *— Pleadings — Allegation of fact made by party in his pleadings deemed admitted by opposite party unless traversed by that party in his pleadings or unless there was a joinder of issue*

Civil Procedure *— Pleadings — Agreed bundle of documents — Whether guarantee was executed by the second defendant — Whether second defendant had by including the guarantee in the agreed bundle of documents without any reservation dispensed with its proof or with its proof of execution*

Banking *— Securities for advances — Guarantee given for loan to purchase property — Whether guarantee was executed by the second defendant — Whether second defendant had by including the guarantee in the agreed bundle of documents without any reservation dispensed with its proof or with its proof of execution*

Contract *— Privity — Whether second defendant as guarantor but not privy to the loan agreement could claim benefit of terms in the agreement*

The first defendant ('D1'), who was the wife of the second defendant ('D2'), bought a warehouse and thereafter obtained a loan from the plaintiff to finance the purchase, subject to the condition that D2 was to guarantee the repayment of the loan. An acceptance note of the loan was signed by both D1 and D2. This acceptance note was later returned to the plaintiff together with the loan agreement and memorandum of charge. After the receipt of these documents, the plaintiff released the loan. The plaintiff is now suing the second defendant for the amount still owing.

Held, ordering that judgment be entered for the plaintiff:

(1) Any allegation of fact made by a party in his pleadings is deemed admitted by the opposite party unless it is traversed by that party in his pleadings or unless there was a joinder of issue. The second defendant admitted or 'confessed' in his amended defence that he signed a guarantee but he attempted to avoid it by further saying that he could not recall whether the loan transaction was the same one as alleged by the plaintiff in this action or whether the guarantee he signed was the one now sued upon by the plaintiff. But what he 'cannot remember' does not in any way qualify the admission or 'confession' and does not amount to a denial that he executed the guarantee. Therefore, the second defendant had not, anywhere in his pleadings, expressly or impliedly or generally, traversed the allegation that he had executed the guarantee. That

being so, the plaintiff was relieved of the burden of having to prove the execution by the second defendant of the guarantee since the execution had been admitted by it not being denied by the defence.

(2) The second defendant, through his counsel, not only agreed to the inclusion of the guarantee in the agreed bundle of documents but did so without any reservation. The second defendant had by such conduct dispensed with its proof or with its proof of execution.

(3) Although there was no evidence that the second defendant had requested the loan for the first defendant, the loan was at the desire of the second defendant and that constituted the consideration for the guarantee.

(4) As the second defendant was not privy to the loan agreement, the defendant could not claim the benefit of any of the terms in the loan agreement. Therefore, a demand need not be made for repayment before the loan is repaid.

Per curiam:

(1) Though a defendant is entitled to plead any number of defences, whether in the alternative or cumulative, and even though obviously inconsistent, such distinct grounds of defence must be stated separately and distinctly and the defendant must not leave the plaintiff in doubt as to what he has admitted and what he has denied.

(2) It is improper for an advocate in argument, to assert as a fact that which had not been proved.

[Bahasa Malaysia summary

Defendant pertama ('D1'), isteri defendan kedua ('D2'), telah membeli sebuah gudang dan telah mendapat suatu pinjaman daripada plaintif untuk membiayai pembelian itu, tertakluk kepada syarat bahawa D2 memberi jaminan bahawa pinjaman itu akan dibayar balik. Suatu nota penerimaan telah ditandatangani oleh kedua-dua D1 dan D2. Nota penerimaan itu kemudiannya telah dipulangkan kepada plaintif bersama dengan perjanjian pinjaman dan memorandum gadaian. Selepas dokumen itu diterima, plaintif telah memberi pinjaman itu. Plaintif sekarang mendakwa defendan kedua untuk jumlah wang masih terhutang.

Diputuskan, memerintahkan supaya penghakiman dimasukkan bagi pihak plaintif:

(1) Sebarang pengataan fakta yang dibuat oleh sesuatu pihak di dalam plidingnya disifatkan sebagai telah diterima oleh pihak pembangkang melainkan ia disangkal oleh pihak itu di dalam plidingnya atau melainkan terdapat suatu percantuman isu. Defendan kedua telah 'mengaku' di dalam pembelaannya yang telah dipinda bahawa beliau telah menandatangani suatu jaminan tetapi beliau telah cuba mengelakkannya dengan menyatakan

bahawa beliau tidak ingat sama ada transaksi pinjaman itu adalah yang sama dengan transaksi sepertimana yang dikatakan oleh plaintif di dalam tindakan ini atau sama ada jaminan yang ditandatangani itu merupakan jaminan yang menjadi subjek dakwaan plaintif. Tetapi apa yang beliau 'tidak ingat' tidak sama sekali membataskan 'pengakuannya' dan tidak bererti bahawa beliau menafikan yang beliau telah menyempurnakan jaminan itu. Oleh itu, defendan kedua tidak, mana-mana dalam plidingnya, secara nyata, tersirat atau pada amnya, menyangkal pengataan bahawa beliau telah menyempurnakan jaminan itu. Dengan itu, plaintif dilepaskan daripada beban untuk membuktikan bahawa defendan kedua telah menyempurnakan jaminan itu, kerana penyempurnaan jaminan itu telah diakui oleh pihak pembela kerana mereka tidak menafikannya.

(2) Defendan kedua, melalui peguambelanya, bukan sahaja telah bersetuju supaya jaminan itu dimasukkan ke dalam ikatan dokumen yang telah dipersetujui, tetapi melakukannya tanpa sebarang syarat. Defendan kedua, melalui perbuatannya, telah mengetepikan keperluan membuktikan jaminan itu atau keperluan membuktikan penyempurnaannya.

(3) Walaupun tidak terdapat bukti yang menunjukkan bahawa defendan kedua telah meminta pinjaman itu untuk defendan pertama, pinjaman itu telah dibuat atas kehendak defendan kedua dan itu merupakan balasan untuk jaminan itu.

(4) Oleh kerana defendan kedua tidak menjadi pihak kepada perjanjian pinjaman itu, beliau tidak boleh mendapat faedah daripada sebarang terma di dalam perjanjian itu. Oleh itu, suatu tuntutanuntuk pembayaran balik tidak perlu dibuat sebelum pinjaman itu dibayar balik.

Per curiam:

(1) Walaupun seseorang defendan berhak membentangkan seberapa banyak pembelaan, sama ada secara alternatif atau kumulatif, dan walaupun ianya adalah tidak konsisten, alasan pembelaan yang berlainan itu mestilah dinyatakan secara berasingan dan defendan tidak patut meninggalkan plaintif dalam keraguan mengenai apa yang telah diakui dan apa yang telah dinafikannya.

(2) Adalah tidak betul untuk seseorang peguambela yang sedang menbentangkan hujah-hujahnya untuk menyatakan sebagai fakta sesuatu yang belum dibuktikan.]

Cases referred to

1 *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd & Ors* [1946] 2 All ER 685 (refd)
2 *Harris v Gamble* (1878) 7 Ch D 877 (refd)
3 *Rutter v Tregent* (1879) 12 Ch D 758 (refd)
4 *Henry Trading Co Ltd v Harun* [1966] 2 MLJ 281 (refd)
5 *Yap Choo Hoo v Tahir bin Yasin & Anor* [1970] 2 MLJ 138 (refd)
6 *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 (refd)

7 *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2 MLJ 204 (refd)
8 *Hongkong and Shanghai Banking Corp v Sykt United Leong Enterprise Sdn Bhd & Anor* [1993] 2 MLJ 449 (refd)
9 *Borneo Housing Mortgage Finance Bhd v Lee Shen Fong @ Joseph Francis* (Tawau High Court Civil Suit No T100 of 1988) (unreported) (refd)

David Fung (*Alex Pang & Co*) for the plaintiff.
Patricia Hiew (*Chau & Thien*) for the second defendant.

Cur Adv Vult

Ian HC Chin J: This action concerns the plaintiff and the second defendant. The plaintiff sues the second defendant on a guarantee agreement dated 18 March 1983 ('the guarantee') for the sum of RM270,336.20 and interest which sum was the amount still owing by the first defendant under a loan agreement cum assignment dated 18 March 1983 ('the loan agreement'). At the close of the plaintiff's case, the second defendant elected to submit that the plaintiff had failed to prove its claim. The evidence, including documents admitted by agreement as evidence and facts agreed to in a statement, are these.

The first defendant, who was the wife of the second defendant, bought a warehouse from a developer under an agreement dated 14 October 1982. She applied for a loan from the plaintiff and the plaintiff by a letter dated 8 March 1983 (exh FB(15)) offered to lend the first defendant RM217,000 to help finance the purchase of the said warehouse subject to the condition, inter alia, that the repayment of the loan be guaranteed by the second defendant. Wong Fui Cheng, an officer of the plaintiff, testified that a completed data form relating to the second defendant was received after it was sent to the first defendant to enable her to procure the particulars and signature of the second defendant. The first and second defendants according to this witness, signed and accepted the offer. This acceptance note, according to this witness, was later returned to the plaintiff together with the loan agreement and memorandum of charge. This acceptance note was not produced. She testified that it was after the receipt of these documents together with the duly signed guarantee that the plaintiff released the loan. She admitted in cross-examination that she had never met the second defendant and she did not see the second defendant sign the guarantee. Another witness for the plaintiff was an advocate, Ting E Hang ('PW1'), who testified that he attested the signatures of the first defendant to the loan agreement and memorandum of charge. The last witness for the plaintiff was a valuer called Chang Fu Lin and he testified that the price of RM220,000 he recommended for the force sale of the property which forms the security for the loan was fair and he gave a detailed explanation of how he arrived at that figure. The evidence show that only the plaintiff made a bid for the property at the price of RM220,000 and the plaintiff on the 8 April 1991 bought the property at the said price. The present amount

claimed by the plaintiff came about as a result of an amendment to the statement of claim to take into account, by giving credit to the proceeds of, the sale of the said property and the interest accrued. Mr David Fung, counsel for the plaintiff, made an unchallenged statement from the Bar that the person who attested the signature of the second defendant to the guarantee had passed away and therefore could not be called as a witness. Reference were made to the loan agreement and the guarantee, which documents I will reproduce when I deal with the submissions of counsel relating thereto. For the purpose of determining whether the plaintiff had proved its claim on a balance of probabilities, the pleadings will have to be looked into. The relevant part of the amended statement of claim reads:

(5) By a letter of guarantee dated 18 March 1983 and for due consideration therein, the second defendant agreed to guarantee the due payment of RM217,000 together with interest, penalties and other payment due to the plaintiffs by the [first defendant].

(6) Pursuant to the said [loan agreement], charge-in-escrow and [guarantee] the plaintiffs have released the said sum of RM217,000 to or for the benefit of the [first defendant].

(7) [The first defendant] defaulted in her payment ... and the plaintiffs through their solicitors, Messrs Alex Pang, Shim & Co, have by a letter dated 11 June 1988 ... demanded repayment ...

(8) ... On 18 April 1991, the said property was sold to the one and only tenderer for ... RM220,000.

(9) Therefore the first defendant is ... indebted to the plaintiffs in the sum of RM270,336.20 ...

(10) Despite demands ... first defendant ... refused to pay ...

(11) The second defendant has also despite demands by the plaintiffs and their solicitors failed ... to settle his liabilities in accordance with the said guarantee.

In answer to the claim, the second defendant in his amended defence states:

(3) As to para ... 5 of the amended statement of claim the second defendant says he signed a guarantee in respect of a loan to the [first defendant] but the second defendant says he does not recall whether the loan transaction was the same one as alleged by the plaintiffs in this action or whether the guarantee he signed was the one now sued upon by the plaintiffs.

(4) Alternatively, if the guarantee signed by the second defendant related to the loan transaction sued on in this action ... the second defendant says that the said guarantee was given on condition that should the memorandum of charge recited in the second paragraph of the said guarantee executed by the [first defendant] ... be not registrable the said guarantee was to take effect from such event happening ...

(5) Further or in the alternative, the second defendant will contend that cl 6 of the said guarantee is void for uncertainty as it was not clear on the true construction thereof as to whose act, thing or omission shall effect or affect the second defendant's liability as guarantor.

(6) Further or in the alternative, the second defendant denies that he has ever requested the plaintiffs to grant a loan to the [first defendant] in the sum of RM217,000 as alleged in the recital of the said guarantee.

(7) As to paras 6 and 7 ... he had no knowledge of the alleged releases of loan and default of payment by the [first defendant] ...

(8) The second defendant has no knowledge of the matters alleged in paras 8 and 9 of the amended statement of claim and makes no admission in respect thereof.

(9) Further or in the alternative, the second defendant avers that even if there was a sell or disposal of the said property by the plaintiffs ... the sale proceeds. ... did not reflect or represent the market value ... at the time of its disposal and neither is the said sum of RM220,000 the best price that could be reasonably obtained by the plaintiffs for the said property at the time when they auctioned off the same.

(10) The second defendant further denies that the plaintiffs have served demands on him for the outstanding account as alleged in paras 11 of the amended statement of claim and by reasons whereof his liability under the said guarantee does not arise.

It was against the evidence and pleadings that I have set out that Ms Patricia Hiew, counsel for the second defendant, submitted that the plaintiff had failed to prove its claim on a balance of probabilities and the second defendant elected not to call any evidence. What the plaintiff had to prove will depend on what was pleaded in its statement of claim and what had been traversed in the defence. Any allegation of fact made by a party in his pleading is deemed admitted by the opposite party unless it is traversed by that party in his pleading or unless there was a joinder of issue. See O 18 r 13(1) of the Rules of the High Court 1980. A traverse in general form generally suffice. See *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd & Ors*[1] where the court held that the traverse — 'The defendants deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied seriatim' — was in order. But a traverse in the form — 'the defendant puts the plaintiff to the proof of the several allegations in his statement of claim' — was held to be a contravention of O 18 r 13 of English RSC and the plaintiff was entitled to judgment on the ground that the allegations in the statement of claim must be taken to have been admitted (see *Harris v Gamble*[2]). Similarly a defendant's plea — that he did 'not admit the correctness of the statement set forth in paras 1, 2, 3 and 6 of the plaintiff's statement of claim and required further proof thereof' — was held not to be proper traverse of the allegations to those paragraphs (see *Rutter v Tregent*[3]). There is one other rule of pleading which it is relevant to remind myself and that is that though a defendant is entitled to plead any number of defences, whether in the alternative or cumulative, and even though obviously inconsistent, such distinct grounds of defence must be stated separately and distinctly and the defendant must not leave the plaintiff in doubt as to what he has admitted and what he has denied. See 32 *Atkin's Court Forms* (2nd Ed) at p 30. The first of the submissions on the part of Ms Patricia Hiew was that the plaintiff must prove that the second defendant executed the guarantee and this she contended, the plaintiff had failed to do. This means, though Ms Patricia Hiew did not say so expressly, that she contended that the execution by the second defendant of the guarantee was denied in the amended defence. Mr David Fung submitted that the second defendant had not by para 3 of his amended defence denied the execution of the guarantee and that in any

event there are evidence to suggest that the second defendant did in fact sign the guarantee.

The first of the issue appears to me to be whether the execution of the guarantee by the second defendant was denied by the second defendant in para 3 of his amended defence which was reproduced, supra. The second defendant began, in para 3 of his amended defence, by admitting or 'confessing' that he signed a guarantee but he attempted to avoid it by further saying that 'he cannot recall whether the loan transaction was the same one as alleged by the plaintiffs in this action or whether the guarantee he signed was the one now sued upon by the plaintiffs'. The second defendant therefore had expressly admitted or 'confessed' the execution of the guarantee pleaded in the statement of claim but he attempted to plead fresh fact to answer or 'avoid' the legal consequence of the admitted execution of the guarantee. But what he 'cannot remember' did not in any way qualify the admission or 'confession' that the second defendant had executed the guarantee. That he 'cannot remember' whether the guarantee was the one he signed does not amount to a denial that he executed the guarantee. Therefore, the second defendant had not anywhere in his said pleadings, expressly or impliedly or generally, traversed the allegation that he had executed the guarantee. In fact the second defendant had confessed to the execution of the guarantee. That being so, the plaintiff is relieved of the burden of having to prove the execution by the second defendant of the guarantee since the execution had been admitted by it not being denied by the defence. There is one significant point which neither counsel address me and that is the fact of the guarantee forming part of the agreed bundle of documents and it being admitted as exh FE(36)–(39). The legal position of the guarantee forming part of an agreed bundle of documents was stated in *Henry Trading Co Ltd v Harun*[4] at p 282, to be that there is no need to prove the document. This Federal Court decision was questioned by Sharma J in *Yap Choo Hoo v Tahir bin Yasin & Anor*[5] but the criticism appears to have earned an immediate rebuke from the Chief Justice of Malaya when he issued Practice Note No 3 of 1970 to negate the decision or criticism of Sharma J. See *Chong Khee Sang v Pang Ah Chee*[6] as to the issuance of further directions relating to the bundle of documents. The Chief Justice of Borneo had also issued a practice directive, Practice Note No 1 of 1979, regarding documentary evidence in civil actions, cl 2 of which reads:

> In most cases it is possible for advocates to agree on most of the documents to be tendered as evidence. The proper course in every such case is for copies to be prepared and made up in a proper bundle bound and paged in chronological order. This bundle is to be called 'Agreed bundle of documents' which should contain all relevant documents, the authenticity of which is not disputed. The court does not have to see the originals at all. This would avoid the necessity of formal production of the original or copy thereof by any witness. The object of obtaining admission is to preclude the necessity of formally proving documents or facts admitted thus not only saving time and costs but also avoiding inconvenience. Any party unreasonably refusing or neglecting to admit any document or fact, when called upon to do so, whether in pursuant to a notice to admit or to agree the inclusion of any document in an agreed bundle of documents, may he penalized for costs occasioned thereby.

1 *Sarkar on Evidence* (17th Ed) at p 581 (cited in the case of *Borneo Co (M) Sdn Bhd v Penang Port Commission*[7] at p 205) states: A

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of documents marked on admission dispensing with formal proof, the B contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise (*Lionel Edwards Ltd v SA* 1967 C 191).
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> Where documents were produced and not disputed, the Privy Council held that they should be received without proof (*Takai v Beglar* 6 MIA 251; *Nanda Kishore v Ram Kalpa* 6 BLR Ap 49). C

In the present case, the second defendant through his counsel not only agreed to the inclusion of the guarantee in the agreed bundle of documents but did so without any reservation. The second defendant had by such conduct dispensed with its proof or with its proof of execution. See *Chong Khee Sang v Pang Ah Chee*.[6] Therefore, I would also have held, if this aspect D had been argued before me but unfortunately were not, that the guarantee and its execution had been proved. Had it not been for my decision, supra, I would have dismissed the plaintiff's claim as there is no evidence to show that the second defendant had executed the guarantee. The signature on the guarantee which is alleged to be that of the second defendant must be proved as required by s 67 of the Evidence Act 1950 and there is no such E evidence, either in the way of handwriting expert or of witnesses who are familiar with the signature of the second defendant or of the attesting witness.

The next contention of Ms Patricia Hiew was that there was no evidence that the second defendant had requested the plaintiff to lend money to the F first defendant as stated in the recital of the guarantee. The undisputed evidence adduced in this case show that the plaintiff would not have released the loan to the benefit of the first defendant had it not been for, among other securities, the guarantee which the second defendant had signed after the plaintiff had requested for it as a condition for the loan to the first defendant. The second defendant by signing and returning the G guarantee to the plaintiff must have desired that the loan be given to his wife the first defendant. See *Hongkong and Shanghai Banking Corp v Sykt United Leong Enterprise Sdn Bhd & Anor*.[8] It is conceded by Mr David Fung that there was no evidence that the second defendant had requested the loan for the first defendant but he said that the loan was at the desire of the second H defendant and that constituted the consideration for the guarantee; that submission I uphold. Here again the court was not addressed as to whether a statement on the guarantee that the loan was at the request of the second defendant can be contradicted by any evidence tending to show otherwise. In the end it does not matter because the evidence show that there was another consideration for the guarantee and that the loan was at the desire I of the second defendant. Evidence of this other consideration is admissible. See *Hongkong & Shanghai Banking Corp v Sykt United Leong Enterprise Sdn Bhd & Anor*.[8] There was also no objection to the admission of such

A evidence and Ms Patricia Hiew did not bother to reply to the submission of Mr David Fung; there was consideration for the guarantee, albeit not the one stated in the guarantee.

The next argument advanced by Ms Patricia Hiew was that the second defendant being deemed by cl 6 of the guarantee to be the principal debtor must be entitled to the benefit of any term in the loan agreement (exh PC(16)–(27)) made between the plaintiff and the first defendant and particularly cl 1(1) of the loan agreement which reads: '... [first defendant] ... *hereby agrees covenants and undertakes*: (1) To repay to the [plaintiff] on demand the loan ...'.

Ms Patricia Hiew argued that cl 1(1) of the loan agreement provides for a condition precedent, which is that a demand must be made for repayment before the loan needs be repaid. She argued that though there is no provision for a demand to be made in the guarantee, the second defendant is entitled to the benefit of the said cl 1(1) even though the loan agreement was made between the first defendant and the plaintiff by virtue of the second defendant being deemed a principal debtor. I have already dealt with this issue in the unreported case of *Borneo Housing Mortgage Finance Bhd v Lee Shen Fong @ Joseph Francis*,[9] where I said:

> Since the defendant was not privy to the loan agreement, I cannot see how the defendant can claim the benefit of any of the terms in the loan agreement. It is also not one of those rights given to a surety by the Contracts Act 1950.

The same can be said of the present case. There is also no merit in this contention of Ms Patricia Hiew. The next contention of Ms Patricia Hiew was that there was no demand for payment after the property was sold and she contended that the demand is required by cl 2 of the guarantee which reads:

> In the event of the [plaintiff] exercising its right of sale in respect of the property pursuant to the security document then should the proceeds of such sale after deducting all the expenses thereof and incidental thereto (hereinafter called 'the net proceeds') be insufficient to pay all the moneys due and owing to the [plaintiff] by the [first defendant] the [second defendant] shall, at the request of the [plaintiff], forthwith pay to the [plaintiff] a sum representing the difference between the net proceeds and the moneys then due and owing to the [plaintiff].

A little of the facts have to be re-stated for a better understanding of this argument. The plaintiff by its solicitors' letter dated 11 June 1988 (exh PH(42)) demanded payment from the second defendant under the guarantee in respect of the money then owing by the first defendant. The demand was for a sum of RM320,835.26 plus interest. The writ was subsequently on 1 July 1988 issued. The property, which was a security for the loan to the first defendant, was thereafter on 8 April 1991 disposed off for the sum of RM220,000. The plaintiff on 7 September 1993 amended the statement of claim in order to give credit to the second defendant in respect of the proceeds of the sale. The claim of the plaintiff, as a result of the amendment, is now for the sum of RM270,336.20 together with interest at the rate of 14%pa from 10 May 1991 to the date of payment. I have also dealt with this issue in the said unreported case of *Borneo Housing*

Mortgage Finance Bhd v Lee Shen Fong @ Joseph Francis.[9] To construe cl 2 of the guarantee in the manner advocated by Ms Patricia Hiew would have the result that the plaintiff having properly demanded payment and thereafter having properly commenced action for a proper amount of money has now to re-demand payment and to recommence action for recovery of the money just because the plaintiff was honest enough to inform the court that the property, after the commencement of the action herein, had been sold and had thus reduced the amount of the liability of the second defendant. This surely cannot be what the parties had intended. Clause 2 of the guarantee envisages two situations — one where the second defendant is sued after the property had been auctioned and the proceeds are insufficient to satisfy the loan and the other, where the second defendant is sued before the property is auctioned. In the former case, the plaintiff would have to make a request for payment before he can commence action and not in the latter case. I therefore rule that there is no need for a fresh demand for payment after the sale of the property.

Is there any uncertainty in cl 6 of the guarantee? This was the next argument of Ms Patricia Hiew. She submitted that it is not clear from the wordings of cl 6 as to whose act or thing that affect the second defendant's liability as a guarantor and because of this the whole guarantee is void for uncertainty. Clause 6 of the guarantee says:

> Without prejudice to any right of the [second defendant] against the [first defendant] as principal debtor the [second defendant] as between himself and the [plaintiff] shall be deemed to be a principal debtor and not merely as a surety and accordingly shall not be discharged nor shall his liability be effected by any *act thing omission or means* whatever whereby his liability would not have been discharged if he had been a principal debtor and in particular (but not by way of limitation) the [plaintiff] shall have the fullest liberty without affecting this guarantee to postpone for any time or from time to time the exercise of any of the powers conferred by this security document or by law in the event of the [first defendant] committing any default in complying with its terms and to exercise the same at any time and in any manner and either to enforce or forbear to enforce the covenants for payment of principal or interest or any other covenants agreements conditions or stipulations contained or implied in the security document or any other remedies or securities available to the [plaintiff] and the [second defendant] shall not be released by any exercise by the [plaintiff] of its liberty with reference to the matters aforesaid or any of them or by being given to the [first defendant] his personal representatives or assigns or by any variation in the provisions of the security document or re-arrangement of the terms of repayment of the loan or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the [second defendant]. (Emphasis added.)

It was argued that it is not clear as to whose 'act thing omission or means', those underlined words of cl 6, supra, refer to. I agree with Mr David Fung that reading cl 6 as a whole, those words refer to the act thing omission or means of the plaintiff. I do not see any uncertainty at all and Ms Patricia Hiew also did not expound on her submission which was in one sentence. There is also no substance in this submission.

A Ms Patricia Hiew next submitted that the property, which formed the security for the loan, was not described in the guarantee or the memorandum of charge and thus 'raises doubt as to what or which property the plaintiff is referring to'. Here again, counsel never explain or expound how such omission can affect the guarantee or the liability of the second defendant. The guarantee and memorandum of charge contain blanks which were B meant to be filled up but were not. The blank in the guarantee is like this:

> Whereas the [plaintiff] at the request of the [second defendant] has agreed to lend to [the first defendant] the sum of Ringgit two hundred and seventeen thousand only (RM217,000) upon the security of a memorandum of charge (hereinafter called 'the security document') executed by the [first defendant] C dated the _ day of _ one thousand nine hundred and _ (19_) in respect of the land and premises held under or comprised in _.

The underlinings show the places where the date and the title number of the property were supposed to be inserted but were not. These particulars were also not filled in the memorandum of charge. The contemporaneous D documents, like the letter of offer (exh PB(15)), established that the property concerned was Lot 1, Block A, Taman El-Nysa, Tawau. PW1 gave evidence in court that the blanks could not be inserted until after the subdivided titles is issued. These evidence were not objected to by Ms Patricia Hiew and she also did not reply to the submission of Mr David Fung that the evidence explained the blanks. Ms Patricia Hiew did not reply to the E submission and I take it she had conceded the point. I will also assume that s 93 of the Evidence Act 1950, which excludes evidence to explain a defective language in a document, does not apply since Ms Patricia Hiew did not submit that it applies to this case.

It was next submitted by Ms Patricia Hiew that the guarantee is to take F effect only when the memorandum of charge is not registrable and that, according to her, is laid down in cl 9 of the guarantee which reads:

> The [second defendant] hereby agrees and confirms that, if the security document referred to in the recital to this [guarantee] is not a registered or registrable memorandum of charge and the [first defendant] subsequent to the date of this G [guarantee] and in compliance with the provisions of the security document by himself or by his attorney executes a memorandum of charge in favour of the [plaintiff] in substitution for the security document, this [guarantee] shall bind the [second defendant] to guarantee the due performance by the [first defendant] of his obligations under such memorandum of charge and all references herein to 'the security document' shall thereafter be construed as referring to such memorandum of charge.

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She submitted that there is no evidence that the memorandum of charge is not registrable and therefore the guarantee does not come into effect as yet; the second defendant is therefore not liable under the guarantee. Here also, she never expound how the words of cl 9 of the guarantee can be interpreted to mean the way she had submitted. Clause 9 merely provides for the words I 'security document' to refer to the memorandum of charge already stated in the recital of the guarantee or to any other memorandum of charge in substitution therefore for reason of the stated memorandum of charge being

not registered or being not registrable. No matter how you juggle the words around, syntax or otherwise, you still cannot come to the interpretation that Ms Patricia Hiew had put on the words of cl 9. Her submission is devoid of substance.

Ms Patricia Hiew's final submission was in relation to the contention in para 9 of the amended defence which is that the sale of the property was not at the market price or the best price obtainable. The short answer of Mr David Fung, which I agree, was that the plaintiff was, under cl 8 of the loan agreement, entitled to sell the property 'at such prices and in such manner' as the plaintiff shall 'in its absolute discretion think fit' and the second defendant cannot be heard to complain that the sale was not at the market price or at the best price obtainable. The property was advertised for sale at the force sale price of RM220,000 recommended by a valuer and the plaintiff bought the property at that price when there were no bidders. Ms Patricia Hiew also submitted that the plaintiff had shut out or denied other people from tendering for the property but she did not continue with this submission when I asked her to show me the evidence that the plaintiff had shut out or denied other people from tendering for the property. I think it is not out of place here to remind counsel that 'it is improper for an advocate in argument, to assert as a fact that which had not been proved' (see r 21(c) of the Advocates (Practice and Etiquette) Rules 1988).

Given that the second defendant had, for the reasons stated above, failed in his submission that the plaintiff had failed to prove its case, I order that judgment be entered for the plaintiff against the second defendant for the sum of RM270,336.20, together with agreed interest on the sum of RM270,336.20 at the rate of 14%pa from 10 May 1991 to the date of payment and costs on a solicitors and client basis to be taxed.

Order accordingly.

Reported by Jeanne Tan